

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

NORMAN SEAY, et al.,

Appellants,

v.

TIM JONES, et al,

Respondents.

DOCKET NUMBER WD77873

Date: September 15, 2014

Appeal from:
Cole County Circuit Court
The Honorable Jon E. Beetem, Judge

Appellate Judges:
Special Division: Alok Ahuja, C.J., and Victor Howard and Gary D. Witt, JJ.

Attorneys:
Jeremiah Morgan, Jonathan M. Hensley, David H. Welch, Jefferson City, MO for respondents
Anthony E. Rothert, St. Louis, MO and Gillian R. Wilcox, Kansas City, MO, for appellants

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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The General Assembly truly agreed to and finally passed House Joint Resolution No. 90 (“HJR 90”) during its 2014 regular session. HJR 90 is a statewide ballot measure which, if passed, would amend Article VIII of the Missouri Constitution by adding a new § 11, to authorize voting prior to election day in general elections, in person and by mail, in certain circumstances. The constitutional amendment proposed by HJR 90 allows advance voting on the six business days prior to and including the Wednesday prior to election day, at the offices of local election authorities during their normal business hours.

Proposed § 11.5 of HJR 90 provides that “[n]o local election authority or other public office shall conduct any activity or incur any expense” to facilitate early voting “unless a state appropriation is made and disbursed to pay the local election authority or other public office for the increased cost or expense of the activity.” Thus, but for a state appropriation, no advance voting will occur; in such circumstances, the effect of HJR 90 would be to prohibit advance voting.

The General Assembly drafted an official summary statement to appear on the ballot as part of the official ballot title for the proposal. The summary statement drafted by the General Assembly states:

Shall the Missouri Constitution be amended to permit voting in person or by mail for a period of six business days prior to and including the Wednesday before the election day in all general elections?

Appellants Norman Seay and Nimrod Chapel (collectively “Seay”) sought judicial review of the summary statement pursuant to § 116.190, RSMo. They alleged that the summary statement was insufficient or unfair because it failed to advise voters that advance voting would only be authorized if State appropriations were made and disbursed to cover the costs of such early voting, and because the summary failed to advise voters that advance voting would only be

permitted during the local election authority's regular business hours, rather than during the extended hours during which polling places are normally open on election day.

As required by § 116.190.2, Seay's lawsuit named as defendants not only the Secretary of State, but also the Speaker of the House, the President *Pro Tem* of the Senate, and the legislative sponsor of HJR 90 ("the Legislators"). (The Secretary of State has taken no position on the fairness or sufficiency of the challenged summary statement.) The Attorney General's Office appeared in the suit to represent all defendants. Separate counsel also entered an appearance to represent the Legislators, and filed a separate answer, and separate briefs, on their behalf in the trial court and in this Court.

The circuit court granted the defendants' motions for judgment on the pleadings, finding that the summary statement prepared by the General Assembly was fair and sufficient. Seay appeals.

REVERSED, AND A MODIFIED OFFICIAL SUMMARY STATEMENT CERTIFIED TO THE SECRETARY OF STATE.

Special Division holds:

Under § 116.190.1, Missouri citizens are authorized to seek judicial review of the official ballot title for a proposed constitutional amendment, including an official ballot title prepared by the General Assembly. In such an action, the challenger must "state the reason or reasons why the summary statement portion of the official ballot title is insufficient or unfair." § 116.190.3.

Prior caselaw establishes that, to be sufficient and fair, a summary statement should fairly and impartially summarize the purpose of the measure so that voters will not be deceived or misled. The summary statement should accurately reflect the legal and probable effects of the proposed amendment. The question is not, however, whether the existing summary statement is the best language for describing the proposed amendment; there are many appropriate and adequate ways of writing the summary ballot language.

Reduced to its essence, the summary statement tells Missouri voters that, under the proposal, "the Missouri Constitution [will] be amended to permit voting . . . before the election day in all general elections." We have little doubt that the current summary would lead voters to believe that, should the amendment pass, early voting will be permitted in all future general elections in Missouri. That is not the effect of the proposed amendment, however. Instead, the availability of advance voting in any general election depends upon the legislature, and the Governor, exercising their discretionary appropriations authority to fund the increased costs of early voting. Whether early voting actually occurs also depends on whether the Governor exercises his authority under Article IV, § 27 of the Missouri Constitution, to restrict the disbursement of appropriated funds.

These significant contingencies are not referenced in any fashion in the summary statement. And unlike other provisions of HJR 90 which detail the manner in which advance voting will be implemented, the funding contingency would have the effect of completely

eliminating any opportunity for advance voting. The existing summary statement is insufficient and unfair for failing to refer to the funding contingency in any manner.

Seay also argues that the summary is insufficient and unfair for failing to advise voters that advance voting will only be permitted during the local election authority's regular business hours. While it may have been preferable to include this feature in the summary, the hours during which advance voting will be available is merely one among several implementation details contained in HJR 90. It would be impossible to reference all of the implementation features in a 50-word summary. The summary statement is not insufficient and unfair based on its failure to refer to the hours for advance voting.

Section 116.190.4, RSMo states that, in any action to challenge a summary statement for a proposed constitutional amendment, "the court shall consider the petition, hear arguments, and in its decision certify the summary statement portion of the official ballot title to the secretary of state." Section 116.190 has been interpreted in numerous prior cases to permit the court to certify modified summary statement language to the Secretary of State, where necessary to make the summary statement fair and sufficient. Accordingly, we certify the following modified language to the Secretary of State:

Shall the Missouri Constitution be amended to permit voting in person or by mail for a period of six business days prior to and including the Wednesday before the election day in general elections, but only if the legislature and the governor appropriate and disburse funds to pay for the increased costs of such voting?

Seay also argues that the trial court erred in failing to strike the briefs filed by the Legislators' separate counsel. Seay argues that the Attorney General has the exclusive authority to represent the Legislators in this action, because the Legislators were sued solely in their official capacities. It is unnecessary to address this issue. Seay does not identify any respect in which he was prejudiced by the participation of the Legislators' separate counsel. Separate counsel did not seek any additional or different relief than the Attorney General, and merely providing additional argument on the legal issues presented in this case. Separate counsel would undoubtedly have been permitted to participate in this case as *amicus curiae* in any event.

Before: Special Division: Alok Ahuja, C.J., and Victor Howard and Gary D. Witt, JJ.

Opinion by: Alok Ahuja, Judge

September 15, 2014

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